SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 109.

JAMES BRISTOL, as executor of the last will and testament of SOPHIA M. BRISTOL, Deceased.

Plaintiff in Error.

vs.

WASHINGTON COUNTY, STATE OF MINNESOTA.

Defencant in Error.

BRIEF OF DEFENDANT IN ERROR.

From the year 1869 until November, 1883, William M. McCluer who resided in the City of Stillwater, Washington County, Minnesota, carried on a very considerable business in loaning money to persons residing in Minnesota, secured by mortgages on real estate situate in Washington County, and other adjoining counties in Minnesota, but principally in Washington County.

Folio 87, Page 49 Record.

McCluer had an office in Stillwater where said loans were negotiated and such business transacted and the notes and mortgages taken on such loans were executed and made payable at such office, and in the usual course of such business, the sums due on said loans, both principal and interest, were collected by McCluer who from time to time re-invested the same in like loans to residents of Minnesota, secured by like mortgages on real estate in Washington and other adjoining counties in Min-

nesota, principally in Washington County; so that the entire fund and its accumulations as nearly as practicable, were kept permanently invested in such loans in Minnesota.

Folio 87, Page 49 Record.

Folio 91, Page 51 Record.

The money so loaned by William M. McCluer in said business was the property of Cyrus Jefferson, a resident of the Village of Warsau, New York, who during the years mentioned authorized McCluer to carry on said loan business in the manner stated and in whose name all such notes and mortgages were taken, but such notes and mortgages were kept in the hands of William M. McCluer, who remitted to Jefferson from time to time, such sums as the latter required for his living expenses. All money in said business when not actually loaned, was kept by McCluer in his own bank account in Stillwater.

Folio 87, Page 49, Record.

Folio 91, Page 51, Record.

In the year 1880 the assessors of the Village of Warsau, New York, where Jefferson resided, assessed him for the mortgage loans taken by agents in Illinois and Wisconsin, and also upon the mortgage loans procured by William M. McCluer in Washington County, Minnesota, and Jefferson resisted the tax on the ground that such property had been accumulated in such states from small investments originally made by placing money to loan in the hands of McCluer and other agents who fully controlled such investments and who re-invested the same both principal and interest from time to time and who had full control and management of such business so that the property was permanently invested in such states and the situs and place of taxation of such property was in the several states where such agents resided. The Court of Appeals of New York, in April, 1882, so decided in

People ex. rel. Jefferson vs. Smith, 88 N. Y. 576.

Folio 71, Page 39, Record.

In the years 1882-1883 the mortgage loans so taken by said William M. McCluer and accumulated in said loan business by him for Cyrus Jefferson as stated, were assessed and taxed to Cyrus Jefferson by the proper taxing officers of the state of the State of Minnesota, acting in and for Washington County.

Folio 91 Page 52 Record.

While proceedings on such tax levies were pending and in November, 1883, Cyrus Jefferson died, and his estate, in Minnesota, including the mortgage loans acquired in said loan business so carried on by his agent, William M. McCluer, was probated in the Probate Court of Washington County, Minnesota.

Folio 91, Page 52, Record.

In the course of such probate proceedings and in March 1884, Washington County duly filed its claim for the taxes so levied on said mortgage loans for the years 1882, and 1883 as above stated, against the estate of Cyrus Jefferson. The claim was allowed against his estate and was appealed to the District Court, and there such allowance was affirmed and an appeal was taken to the Supreme Court of the State. In 1886 the Supreme Court of Minnesota upon such appeal, held such loans taxable in the State of Minnesota, upon the ground that such property was so permanently invested in Minnesota, and under the control and management of William M. McClure as agent of Jefferson as to give it a situs in Minnesota taxable there under the Statutes of Minnesota.

In re Jefferson, 35 Minn. 215, Foli 71, Page 39, Record.

In 1883, prior to May 1st, (the taxing day in Minnesota) Cyrus Jefferson directed said McCluer to, and the latter did, invest Eighteen Thousand Dollars, ($18,000.00) of the money then in said loan business, in similar loans secured by mortgages on similar lands, in the name of Sophia M. Bristol, daughter of Cyrus Jefferson.

Folio 88, Page 49, Record.

After Jefferson's death in November, 1883, and on December 18, 1883, all of the notes and mortgages which

had been accumulated and acquired in said loan business carried on by McCluer in Stillwater as aforesaid, and then remaining unpaid were assigned and transferred to his daughter, Sophia M. Bristol, as her share of the estate of her father, Cyrus Jefferson. Thereafter said loaning business was carried on and transacted by said William M. McCluer and Charles McCluer his son, and in addition to having the control and authority previously exercised by William M. McCluer in carrying on said loan business for her father Cyrus Jefferson, Sophia M. Bristol gave to said McCluers a power of attorney authorizing them or either of them, to satisfy and assign all mortgages of record in her name in Minnesota and Wisconsin. This power of attorney was formally revoked in November, 1890, but such revocation was not recorded in Washington County until February 14th, 1893.

Folio 88, Page 49 Record.

After Sophia M. Bristol became the owner of the said loaning business and the notes and Mortgages accumulated and resulting therefrom, said McCluers continued, as William M. McCluer previously did for Cyrus Jefferson, to make all collections on account of said loans and to transact the details of said loan business at said office in Stillwater, and to make new loans and investments from the proceeds of such collections, making all notes and mortgages payable at their office, negotiating such loans there, keeping said funds and accumulations thereof as nearly as practicable permanently invested in like loans in the State of Minnesota, principally in Washington County.

Folio 88, Pages 49 and 50, Record.

Said McCluers kept all money arising in the conduct of said business when not actually reloaned and re-invested by them as aforesaid, in their own name in their bank account in the city of Stillwater.

Folio 91, Page 51 Record.

In March 1885, and while the claims of Washington County against the estate of Cyrus Jefferson for the taxes of

1882, and 1883, was pending in the Courts of Minnesota, all the notes taken in said loaning business by McCluer and in their hands, and then owned by Sophia M. Bristol, were sent East to Sophia M. Bristol, who was then, and during all the period covered in this case, was a resident of the State of New York.

Folios 88-89. Page 50 Record.

It does not appear at whose suggestion or request the notes were sent to her.

Thereafter all new notes and mortgages taken on re-loans and re-investments, were made, and made payable as before at the office of said McCluers, but the notes were sent to Sophia M. Bristol and she retained them, until the McCluers called for such notes for use in such loan business. And, as such notes were from time to time required by said McCluers in the course of such loan-business for payment, renewal or foreclosure, or otherwise, they were returned to the McCluers. The mortgages during all of the time covered by this case, were retained in the actual possession of the McClures at Stillwater, Minnesota.

Folio 89, Page 50, Record.

The loaning business was carried on after March, 1885, in the same manner as before, collections both principal and interest were made at said McClures office and were kept and reinvested by the McCluers in the same manner and upon like securities as before and were generally made upon their own judgment, but sometimes upon the advice of the husband of Sophia M. Bristol.

Folio 89, Page 50.

The McCluers remitted money to Mrs. Bristol from time to time as requested by her and what was not remitted was invested in new loans as aforesaid. The amount of loans taxed in Washington County appears to have fluctuated from One Hundred and Eighty-four Thousand Dollars, ($184,000) in 1884, to One Hundred and Ninety-six Thousand Dollars

($196,000) in 1888 to One Hundred and Seventy-nine Thousand and Nine Hundred Dollars, ($179,900) in 1894.

Folio 86, Page 48, Record.

The business was thus continued by the McCluers until 1890 when William M. McCluer died, and his son, Charles M. McCluer continued to conduct the business alone in the same manner until Sophia M. Bristol died in 1894.

Folio 90, Page 51, Record.

The only difference in the manner of conducting the business during the lifetime of Jefferson and during the life of Sophia M. Bristol, was that after his death, the notes and mortgages were payable to Sophia M. Bristol, and after March 1885, the notes were sent east and retained by her until they were returned from time to time to the McCluers as required by the latter for use, collection, renewal or foreclosure, in such loan business. In all other respects the general course of conducting said loan business remained the same, except that after Cyrus Jefferson's death, the McCluers had also authority to satisfy and assign all mortgages in the name of Sophia M. Bristol in Minnesota, until the revocation of said power of attorney. Keeping the money prior to re-investment in Bank at Stillwater in their own name.

Folio 90, Page 51, Record.
Folio 91, Page 51, Record.

This property, being the loans so made by the McCluers, as stated, was assessed each year from 1883 to 1894, both inclusive, being listed as "Credits other than that of banks, bankers, brokers or stock jobbers."

Folios 85-86, Pages 47-48, Record.

In September, 1894, after the death of Sophia M. Bristol, probate proceedings were commenced in the Probate Court of Ramsey County, Minnesota, as to her estate situated in Minnesota, including the mortgage loans so acquired and accumulated in the said loan business so conducted by William M. McCluer for Cyrus Jefferson, and by both McCluers for Sophia M. Bristol.

Folio 2, Page 2, Record.

In the course of such probate proceedings and on April 18th, 1895, this proceeding was commenced by the filing in said Probate Court of Ramsey County, Minnesota of the duly verified claim of Washington County, Minnesota, for such personal property taxes so levied for the years 1883 to 1894, both inclusive, amounting to the sum of Sixty-four Thousand, Six Hundred and Eighty-four Dollars and Seventy-eight Cents ($64,684.78) and interest against the estate of Sophia M. Bristol.

Pages 20, 21, 22, 23 Record.

Thereafter on April 29th, 1895, James M. Bristol, as executor of the last will and testament of Sophia M. Bristol, deceased, made answer and written objection to said claim in said Probate Court of Ramsey County, Minnesota.

Pages 23, 24, 25 Record.

Thereafter such proceedings were had that upon the petition of said James M. Bristol, as such executor, showing among other things that he was a citizen of the State of New York, at the time said claim was so filed against said Estate in said Probate Court; this proceeding was removed from said Probate Court of Ramsey County to the Circuit Court of the United States, and such proceedings were duly had therein that the same came on for trial before the Court without a jury, the parties having waived a jury trial, and stipulated as to the facts.

Pages 26, 27, 28, 29, 30 Record

Pages 47-53 Record.

No question was, or is made as to the fairness or amount of the assessments or the regularity of the tax proceedings, or of the proceedings to enforce this claim against the estate of the said Sophia M. Bristol, except of course, the claim that the property was not subject to taxation.

Folio 70, Page 38, Record.

Upon the trial the court found the facts substantially as

above stated, and that the course of business had given the property such a *situs* in Minnesota, as under the tax laws of Minnesota rendered it subject to taxation in that state, and that the proceedings were regular, and ordered judgment accordingly.

Pages 37 to 46, Record.

ARGUMENT.

Nine assignments of error are made by plaintiff in error in his petition for a writ of error.

Record page 54 and 55.

These assignments of error present, it seems to us, only two question,

First: Does any statute of the State of Minnesota which authorizes, or which the Court below determined authorized the rendition of this judgment, amount to taking of property of plaintiff in error without due process of law?

Second: Had the property taxed a *situs* in the State of Minnesota so as to subject it to taxation in that state?

The first question is the only one which justifies this Court in taking jurisdiction. Counsel for plaintiff in error do not clearly point out what statute of Minnesota contravenes the provisions of the constitution of the United States which counsel claim are violated.

The question is, 'Can a state by a law providing for the levying of taxes against property within its territorial limits, owned by a non-resident, create any obligation on the part of the owner of such property to pay such tax, beyond his liability to have the specific property taxed, taken to pay it, although no attempt is made to hold the owner personally liable, except upon personal service, nor to take any property in the absence of personal service, other than that taxed, except by attachment proceedings?'

That the law of the State of Minnesota *does* create such an

obligation, is, so far as the State of Minnesota is concerned, unquestionable.

In re Jefferson, 35 Minn. 215.

State vs. Red River Elevator Co., 69 Minn. 131.

County of Redwood vs. Winona & St. Peter Land Co., 40 Minn., 512.

In this latter case the Court say:

"In their reply brief counsel advance a new point against the validity of the act. Briefly stated, it is this: Conceding that the opportunity to answer and be heard in the proceedings to obtain judgment against real property satisfied the constitutional requirement as to "due process of law," yet the act in question provides for the assessment and taxation of both real and personal property, and, as it makes no provision for the collection of such taxes, they can be collected, if at all, only only under the provisions of the general tax law; that under that law (section 58, as amended in 1885, 1567) personal taxes become delinquent on March 1st, and are enforceable, after April 1st, by distress of property; that, as this is prior to any notice or opportunity to the tax-payer to be heard, therefore the act is void as to personal taxes, and, if so, the whole act is void, *first*, because its purposes are so connected that it cannot be presumed that the legislature would have passed it for the the purpose of collecting taxes for "omitted" years on real property alone; and, *second*, to hold it valid as to taxes on realty, and not on personalty, would render it repugnant to the constitutional provisions requiring equality of taxation. Without admitting the correctness of the other postulates in this line of reasoning, we think the assumption is erroneous that these personal taxes could only be collected by proceedings under the general tax law. It will be observed that the objection suggested is not to the act of 1881, providing for the assessment of the taxes, but to the supposed inapplicability of the provisions of section 58, for the purpose of enforcing them, because, if applied, they would be, under the circumstances, unconstitutional. But, assuming that section 58 is for that reason inapplicable, and also assuming that the taxes could not be enforced under

the provisions of section 60" (1569) "by serving a citatation on the party to show cause why judgment should not be rendered against him, in short, assuming that no provision of the law would be applicable—still there is a valid tax constituting a statutory liability against the property-owner to the state, which, in the absence of any law providing any other method, might be enforced by an ordinary personal action."

That it is no new or unusual thing for a sovereignty to create an obligation to pay a tax by the statute providing for its levy, and that such an obligation is one on which a common law action of debt may be maintained, is abundantly proved by the decisions of this court.

Meredith vs. United States, 13 Pet. 486.

Dollar Savings Bank vs. United States, 19 Wall. 227.

And that such obligations are of the very highest nature is also abundantly supported by authority,

State of Minnesota vs. Central Trust Co. 94 Fed. 244.

In this latter case the Court say:

"It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but is an obligation which by its nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare snch priority. And in some well-considered cases the priority has been accorded to a tax, although the statute imposing it failed to provide in so many words that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private contracts." * * * * "These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the

requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support."

It will be noted that the lien which is under consideration in the case last cited is not necessarily a lien upon the property taxed. The property is taxed as of the 1st day of May. The tax lists go into the hands of the treasurer on the first Monday in January following. (Section 1562). While it is sometimes true that the property upon which the tax is levied will still, some portion of it, be in the possession of the person against whom the tax is asssessed on the following first Monday in January, it is not by any means the universal rule, or so usual that it can be said that the statute contemplates only a lien upon the property taxed. Hence,

We say that the provision for a lien upon other property of the person against whom the tax is assessed, is clearly a recognition and declaration of the principle that the levying of the tax creates an obligation on the part of the person against whom it is assessed, to pay it. And it is also settled in this Court that law authorizing the imposition of a tax by assessment upon property according to its value, does not infringe the provision of the Fourteenth Amendment, if the owner has an opportunity to question the validity or the amount of it, either before the amount is ascertained, or in subsequent proceedings for its collection.

Winona & St. Peter Land Co. vs. Minnesota, 159 U. S. 526.

See page 537 of the opinion, where numerous authorities are cited in support of this proposition.

But the State of Minnesota has not undertaken to say that as against either a resident or non-resident, any judgment shall be rendered against the taxpayer, subjecting his other property to the payment of such a tax, except by proceedings which are everywhere recognized as due process of law, and as authorized by the constitution of the United States.

The statute of Minnesota simply provides that in the col-

lection of a personal property tax against a non-resident, no judgment can be rendered against the non-resident, which will subject any of his property to the payment of a tax, unless he comes within the state and is personally served, or if not personally served, then an action can be commenced by attachment, but no judgment can be obtained under which any of his property can be taken, except the property seized under the attachment process, or, as will be seen later, in the probating of an estate (and this applies equally to a resident or non-resident) the tax may be filed as a claim against the estate with full opportunity for a defense. This is all that the Minnesota statute undertakes.

Let us see if this is not ture.

Now, without calling attention to the provisions of the Minnesota statute which give a right of hearing before the board of review, it is enough to say that when it comes to the collection of a personal property tax, Section 1567 provides as follows:

"All unpaid personal property taxes shall be deemed delinquent on the 1st day March next after they become due, and thereupon a penalty of ten per cent shall attach and be charged upon all such taxes. On the 1st day of April in each and every year the county treasurer shall make a list of all such delinquent personal property taxes which he shall certify to the clerk of the district court of his county and the said clerk shall immdiately issue his warrants to the sheriff of the county, directing him to proceed to collect the same, and if such taxes are not paid on demand, said sheriff shall distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same."

Then follows provision for advertising and sale, unnecessary, we take it, to quote.

There is nothing in this section to suggest an action against the owner. It simply provides for a warrant of distraint to be levied upon property found in the county, and is strictly a proceeding against property itself.

Upon return of the warrant unsatisfied, and a review by

the board of the returned warrants, a list of unpaid warrants is certified to the clerk of the court, and he issues a citation.

"Section 1563. Within ten days after the adjournment of the board of commissioners, the auditor shall file a copy of such revised list with the Clerk of the District Court of the county, and within ten days after the filing of such copy, the clerk shall issue and deliver to the sheriff of the county where the person against whom such tax's claimed, may at the time reside, or be, for service, a citation for each delinquent named on the list, stating the amount of tax and penalty and requiring such delinquent to appear on the 1st day of the next general term of the district court in the county, appointed to be held at a time not less than thirty days after the issuance of such citation, and show cause if any there be, why he should not pay such tax and penalty and if he fails to pay said tax, penalty and cost to the sheriff before the first day of the term, or on said day to show cause as aforesaid, the court shall direct the clerk to enter a judgment against such delinquent for the amount of such tax, penalty and cost." * * * * * "Provided further, that the citation herein provided for, shall be *prima facie* evidence that all the provisions of law in relation to the assessment and levy of taxes have been complied with, and no omission of any of the things by law provided in relation to such assessment and levy, or of anything required by any officer, or officers, to be done prior to the issuance of such citation, shall be a defense or objection to such taxes, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that such taxes have been unfairly or unequally assessed, and in such case, but no other, the court may reduce the amount of such tax, and give judgment accordingly. It shall, however, always be a defense to such taxes that the same have beed paid, or that the property upon which the same were assessed was not subject to taxation. Provided further, that where a citation is not served by reason of the fact that the person against whom such tax is assessed is a non-resident of the state of Minnesota, or by reason of the fact that such person shall have died and his estate shall have been administered and assigned, a new citation shall

issue in a proceeding brought by the county attorney against the person to whom the residue of any estate of any deceased person shall have been assigned, which proceeding shall be brought in the name of the State of Minnesota of the proper county, and in any such proceeding, provision may be had by attachment or garnishment, as in civil actions. * * * * And the court may acquire jurisdiction by publication of such citation in the same manner as in the publication of the summons in proceedings and attachment against non-residents, and such proceedings may be brought to final judgment in the same manner as provided in proceedings in citation for non-payment of personal property taxes. * * * * Provided further, that in case any person against whom such tax is claimed, resides out of the state of Minnesota at the time of the issuing of such citation, and thereafter, so that service of said citation cannot be obtained upon said person, then, and in that case the said action and proceeding may be commenced by the issuing and publication of a summons and by attachment, as provided in reference to other actions and proceedings, and in accordance with the provisions of the statute of Minnesota under Title 9 of Chapter 66 of the General Statutes of One Thousand, Eighty Hundred and Seventy-Eight."

We do not think it necessary to quote Title 9 of Chapter 66, but content ourselves with saying, and we do not think counsel for plaintiff in error will question the correctness of our statement, that there is nothing in Chapter 66 which pretends or for which it has ever been for one moment claimed, that a judgment obtained against a non-resident could be a lien upon or enforced against any property other than that taken in attachment.

The citation provided for in Section 1569 to be served upon the property owner, is the institution of a proceeding to recover the tax claim. This is a proceeding by service of a summons and in such proceeding no one contends that the statute has any extra territorial affect. At the proper stage, when a distress warrant has proved fruitless a citation, a summons, issues for service. If served upon a person within the

state, the judgment would be like any other judgment, one which could be made out of any of his property subject to execution, but if served by attachment and publication on account of his being a non-resident, or out of the state, the judgment can only bind so much of the property as is taken in attachment.

The case cited by plaintiff in error, *Dewey vs. Des Moines, 173 U. S. 193*, we submit is not in point. In that case a citizen of Illinois was the owner of certain lots in Des Moines, Iowa, which were assessed by the municipal authorities for local improvement in an amount beyond their value. The statutes of Iowa authorized a personal judgment against the owner without any personal service on him. In discussing the statute, the Court say:

"Thus a non-resident, simply because he was the owner of property on a street in a city of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council. The plaintiff prior to the imposition of the assessment had never submitted himself to the jurisdiction of the state, and the only jurisdiction the state had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots for a local improvement is in the nature of a judgment?"

And further commenting, the Court say:

"The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature, is the same which prevents a state from taking jurisdiction through its courts by virtue of any statute over a non-resident not served with process within the state, to enforce a mere personal liability and where no property of the non-resident has been seized, or brought under the control of the Court." Citing the leading case of *Pennoyer vs. Neff*.

Further:

"A judgment without personal service against a non-

resident is only good so far as it effects the property which is taken or brought under the control of the court, or other tribunal, in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken."

The principle involved in the Dewey case as said by this Court, is the principle which prevents the state from taking jurisdiction without service, and in excess of property seized.

It will be seen therefore, that there is a vast difference between the Iowa statute and the Minnesota statute. The Iowa statute violates the rule that a judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under control of the court, and no jurisdiction can be acquired over the person of the non-resident further than respects the property so taken. The Minnesota statute does not contemplate any judgment until after personal service or attachment of property, and allows an ample defense and comes within the rule sanctioned by this court in the many cases cited in *Winona & St. Peter Land Co. Minnesota, supra*, and no claim of extra territorial effect can be spelled out of the Minnesota statute nor can any claim be made that a judgment as against a non-resident without personal service can be rendered affecting his property further than his property may be taken in attachment. And this brings it within the law that a judgment without personal service against a non-resident, is good so far as it affects the property which is taken and that jurisdiction is acquired to the extent of the property so taken. *Dewey vs. Des Moines, supra, page 203.*

In addition to the remedy in the statute which we have quoted, the probate code of Minnesota permits the filing of a claim for taxes against the estate of a deceased person against whom the tax was assessed.

In re Jefferson, 35 Minn. 215.

On page 217 that Court says:

"It is not material whether a personal tax is a debt in the sense that action against the person may be maintained to re-

cover it. It is at least a claim against the property which survives the death of the person against whom it is levied, and remains a claim against his estate. The statute regards it as a debt to be paid out of the estate. * * * * This, we think, is conclusive that for purpose of proof and payment out of the estate, a personal tax is a debt."

We insist that there is no statute of Minnesota which can be claimed to have, or attempt to have, any extra territorial effect, nor is there any statute which, as to a non-resident pretends to give any judgment, except in so far as any property which attached, will be subjected to the payment of the tax, or which gives any claim in case of the death of the owner of property, whether resident or non-resident, beyond a claim upon the estate which is in process of administration, so that there is no comparison between the law of Iowa, passed upon by this Court in the Dewey case, and the statutes of Minnesota involved in the case at bar.

Again, looking at the reason of the subject, it will not be questioned but that tangible personal property, (leaving out of question now, choses in action) when situate in a state other than that of the owner's domicile, may be taxed in such other state.

Of what use is it to tax property unless some right or remedy exists to enforce the tax? If the state has jurisdiction to tax such property, it must have jurisdiction and power within its own borders to enforce the collection of such tax by appropriate remedy. One appropriate remedy is no doubt, to proceed against the property taxed, but this is not exclusive, and no reason suggests itself why another appropriate remedy may not be to subject any property of the person whose duty it was to pay the tax, if found within the state, to the payment of such tax. If in the enforcement of such remedy proper notice by personal service or attachment of property is given.

It cannot be claimed that the state is limited to its remedy against the specific property taxed, as its destruction or removal would defeat the collection of the tax. Any property in the state must be liable for the tax, and that is all that the

Minnesota statute seeks or attempts, and we submit that a statute could not be more guarded against running counter to the principle of jurisdiction in the Pennoyer case, than is the Minnesota statute.

We do not believe this court meant to hold in the Dewey case that a statute could not provide a remedy by which, in failure of distraint, judgment could be obtained if proper service was had, by which any or all of the owner's property situated in the state, could be taken to satisfy the tax, whether the owner was a resident or non-resident, nor that a statute could not provide a remedy by which the property of a non-resident to the extent of that taken in attachment could be subject to the payment of a tax. To do so would be a practical denial of the right to tax property of non-residents under any circumstances.

By way of illustration, A. residing in the State of New York, sends into the State of Minnesota a drove of cattle to be kept and maintained in that state. Clearly they would be taxable there. After the assessment, but prior to the proceedings to enforce the tax, he sells this drove of cattle and acquires another, which he still owns, and which is still within the territorial limits of the state of Minnesota. Proceedings are taken to collect the tax levied on account of the first drove. Now, there could be no dispute but that under the statutes of the state of Minnesota, this latter drove might be taken by the sheriff upon his warrant, or if not taken upon the warrant, and the citation was issued, they could be attached and subjected to a judgment for the tax. Does this contravene any constitutional right of the owner? If it does, the state would have no remedy, even though the tax was a proper one, and the party on account of whose property it was levied, had abundant property within the state to satisfy it.

We do not think the validity of such a statute can be questioned. The statute undertakes to provide that the obligation to pay the tax may be enforced in a proceeding in which personal service is made upon the taxpayer, or if personal service

cannot be made, then by attachment, to the extent, and only to the extent, of the property seized.

Referring to the property in the case at bar, the situs of the property in question for the purpose of administration was and is in the state of Minnesota. It is in the jurisdiction of the Probate Court of that state; *Wyman v. Halsted 109 U. S. 654.* A claim was filed in that court. Instead of being tried in that court, or on an appeal in the District Court, the issue upon this particular claim and nothing else, was removed to the Circuit Court. That court orders judgment against the estate of Sophia Bristol, which is in effect a judgment of the probate court, to the effect that the claim thus removed is a claim against the estate, and stands and takes the place of, a determination to that effect by the Probate Court.

We submit that the policy of the state, the method of assessment and the collection of taxes are matters wholly within the discretion of the state where the property, to which it applies, is within its jurisdiction. This principle is sanctioned and emphasized and authorities in this court cited in its support in *Kirtland vs. Hotchkiss, 100 U. S. 497.* And, tested by the decisions of this Court, in the case of *Winona & St. Peter Land Co. vs. Minnesota*, and cases there cited, the provisions of the Minnesota statute are ample and insure to the property owner every protection and right, and the fullest opportunity to assert any defense.

The question in the case at bar is, 'Was the property within the jurisdiction of the State of Minnesota?' If it was, the right of Minnesota to tax it is unquestioned, nor does the attempt and manner of taxation involve any constitutional question or right. The question 'Was this property within the jurisdiction of Minnesota?' was a judicial question, a question of mixed law and fact. The Court determined the question in the affirmative. It is that determination which plaintiff in error seeks to reverse; it is that determination that he complains of, and not of any statute of Minnesota as being in contravention of constitutional rights.

DID THE PROPERTY OBTAIN SUCH A SITUS IN MINNESOTA AS TO RENDER IT TAXABLE IN THAT STATE?

The statutory provisions of Minnesota applicable to the case at bar are as follows, referring to the statutes of 1894 (the italics being ours):

"Section 1508. Property subject to taxation. *All real and personal property in this state*, and all personal property of persons residing therein, * * * is subject to taxation, and such property, or the value thereof shall be entered in the list of taxable property for that purpose, in the manner prescribed by this act, * * *

Section 1510. Personal property defined. Personal property shall, for the purpose of taxation, be construed to include all goods, chattels, moneys, *credits* and effects, wheresoever they may be. All ships, boats and vessels belonging to inhabitants of this state, whether at home or abroad, and *all capital* invested therein; all *moneys at interest*, either within or without this state, due the person to be taxed more than he pays interest for, and all other debts due to such persons more than their indebtedness. * * *

Section 1511. * * * The term "credits," wherever used in this act, shall be held to mean and include every claim and demand for money, or other valuable thing; and every annuity or sum of money receivable at stated periods, due or to become due, *and all claims and demands secured by deed or mortgage, due or to become due.* * * *

Section 1514. Listing of real and personal property. All real property in this state, subject to taxation, shall be listed and assessed every even-numbered year, with reference to its value on the first day of May preceding the assessment; and all real estate becoming taxable any intervening year shall be listed and assessed with reference to its value on the first day of May of that year. *Personal property shall be listed and assessed annually*, with reference to its value on the *first day of May.*

Section 1515. Manner of listing personal property. Personal property shall be listed in the following manner.

1st. Every person of full age and sound mind, being a resident of this state, shall list all his moneys, credits, bonds or stock, shares of stock of joint stock of other companies, when the property of such company is not assessed in this state, money loaned or invested, annuities, franchises, royalties and other personal property.

2nd. He shall also list separately, and in the name of his principal, *all moneys* and other personal property *invested, loaned or otherwise controlled* by him as the *agent* or attorney, or on account of any other person or person, company or corporation whatsoever; *and all moneys deposited subject to his order, check or draft* and all credits due from or owing by any person or persons, body, corporate or politic. * * *

Section 1516. Place of listing personal property. Personal property, except such as is required in this act to be listed and assessed otherwise, shall be listed and assessed in the county, town or district where the owner or *agent* resides. * * *

Section 1523. Lists of personal property to be made under oath. Every person required by this act to list property shall make out and deliver to the assessor, when required, a statement, verified by his oath, of all the personal property in his possession *or under his control, and which*, by the provisions of this act, he is required to list for taxation, either as owner or or holder thereof, *or* as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, *agent* or factor.

Section 1524. Valuation to be fixed by Assessor—Items of list. * * 22nd. The amount of credits, other than that of bank, banker, broker or stock jobber. * * *

Section 1525. Examination under oath by assessor—Refusal to answer.

Whenever the assessor shall be of opinion that the person listing property for himself, *or for any other person*, company or corporation, has not made a full, fair and complete list of such property, he may examine such person under oath, in re-

gard to the amount of the property he is required to list; and if such person shall refuse to answer under oath, and a full discovery make, the assessor may list the property of such person or his *principal*, according to his best judgment and information.

Section 1526. Deductions from credits, how made. In making up the amount of credits which any person is required to list for himself, *or for any other person*, company or corporation he shall be entitled to *deduct* from the gross amount thereof, the amount of all bona fide indebtedness by himself, *or of any such person*, company or corporation. * * *

Section 1537. County auditor to furnish books, etc.—list of real property—of mortgages—meetings of assessors.

The county auditor shall annually provide the necessary assessment books and blanks at the expense of the county, for and to correspond with each assessment district. He shall make out, in the real property assessment book, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and, if unknown, so stated opposite each tract or lot, the number of acres, and the lots or parts of lots or blocks, included in each discription of property. The list of real property becoming subject to assessment and taxation every odd-numbered year may be appended to the personal property assessment book. There shall be appended to *each personal property assessment book a list of all mortgages, or other real estate securities, held, owned or controlled* by residents of the town or district, showing the names of the owners or agents alphabetically arranged, and the amount due on each separate instrument. It is hereby made the duty of the register of deeds to make out such lists according to the records of his office, and deliver them to the county auditor on or before the last Saturday of April in each year. The expenses of such lists shall be paid by the county, on allowance by the county commissioners. The assessment books and blanks shall be in readiness for delivery to the assessors on the last Saturday of April in each year, and the assessors shall meet on that day, at the office of the county auditor, for the purpose of receiving

such books and blanks, and for conference with the auditor in reference to the performance of their duties.

Section 1542. Statement of personal property to be made by owner.

The assessor shall call at the office, place of doing business or residence of each person required by this act to list property, and list his name, and shall require such person to make a correct statement of his taxable property in accordance with the provisions of this act; and every person so required shall enter a true and correct statement of such property, in the form prescribed, which statement shall be signed and verified by the oath of the person listing the property, and delivered to the assessor, who shall thereupon assess the value of such property, and enter the same in his books; provided, if any property is listed or assessed on or after the fourth Monday of June, and before the return of the assessor's books, the same shall be as legal and binding as if listed and assessed before that time.

Section 1544. Refusal to list or swear to statement—Duty of assessor—Oath.

In every case where any person whose duty it is, to list personal property for taxation has refused or neglected to list the same when called on by the assessor for that purpose, or to take and subscribe an oath in regard to the truth of his statement of personal property, or any part thereof, when required by the assessor, the assessor shall enter opposite the name of such person, in an appropriate column, the words "refused to list" or, "refused to swear" as the case may be; and in every case where any person required to list property for taxation has been absent, or unable from sickness to list the same, the assessor shall enter opposite the name of such person, in an appropriate column, the words, "absent," or "sick." The assessor is hereby authorized to administer oaths to all persons who by the provisions of this act are required to swear, or whom he may require to testify in any case, and he may examine upon oath, any person whom he may suppose to have knowl-

edge of the amount or value of the personal property of any person refusing to list or to verify his list of personal property."

These statutory provisions were in force without change during the entire period for which taxes are claimed in this case.

It will be noted that the agents, the McCluers were called upon to list this property each year, except 1893. But they refused to list the same.

Record Folio 90, Page 51.

It will be seen that the statutes of Minnesota do not attempt to fix the *situs* by the mere fact of the domicile of either creditor or debtor, but that as to property owned by a non-resident, the *situs* is fixed at the residence of the agent by the fact that the property is invested, loaned or otherwise controlled by the agent. Nor does it seek, nor is there claimed for the tax provisions of Minnesota, any extra territorial force, but simply that they affect property within the state, invested, loaned or controlled by a resident agent, and it would seem as though this statement would dispose of the proposition urged by plaintiff in error on the trial below, that the domicile of the debtor does not fix the *situs* of the debt, and that tax laws have no extra territorial effect, as neither one of these propositions is involved in the application of the Minnesota statute to the subject matter in this controversy.

The statute of Minnesota as will be seen, provides that all capital invested in the State, all moneys at interest in the State, all moneys deposited in the State subject to the agent's order, and all claims or demands secured by deed or mortgage, is to be assessed under the designation of "credits." under the item of "amount of credits other than that of bank, banker, broker or stock jobber."

The statute does not discriminate against non-residents, but allows the agent of a non-resident to make the same deductions that are allowed to a resident.

The right of the Legislature of Minnesota to prescribe the designation under which any form of property shall be assessed, must, of course, be conceded as an unquestioned right.

Savings Society vs. Multnomah County, 169 U. S. 421.

The provisions of the Minnesota statutes were construed by the Supreme Court of Minnesota *In re Jefferson, 35 Minn, 215*, involving the taxation of the same property, or at least a part of the same property now in question, and it was held that the statute included credits due non-residents, which, by the course of business relating to the investment, control and management of the same, had obtained a *situs* in this State.

The Court further held that the property in question had obtained such a *situs* in Minnesota, as rendered it subject to taxation.

Counsel for plaintiff in error, contended in the court below that there was an irreconcilable conflict of authority upon the question decided by the Supreme Court of Minnesota in the case last cited. We think the apparent conflict of authority is readily explained when we consider the facts involved, the statutes construed, and the results sought for in the several apparent conflicting decisions.

First. There is one line of decisions arising in cases where it was sought to tax in the state of the owner's domicile securities upon property situated in other states. Such casess are,

Kirkland vs. Hotchkiss, 100 U. S. 491.

State ex. rel. Dwinnell vs. Gaylord, 73 Wis. 316.

Darcy vs. Darcy, 51 N. J. Law, 140.

Commonwealth vs. American Dredging Co. 122 Pa., State 386, and the list might be greatly extended. In this class of cases the question was whether the owner of such securities might be taxed in the state of his domicile, and to hold that he could be so taxed, does not in any manner conflict with the well settled principle that property of this kind may have such a *situs*, and by statutory provision be taxable in a state other than that in which the owner resides.

And the property may even be taxed in both states.

Second. There is another line of decisions like the case of *People ex. rel. Jefferson vs. Gardner, 51 Barbour, 353*, where Jefferson was assessed in the Village of Warsau, New York, for mortgage loans taken by agents in Illinois and Wisconsin, in a manner similar to the the loans made by McCluer in the case at bar, and resisted the tax, claiming the loans so made had their *situs* in such states, being permanently invested and managed there by such agents, and properly taxable where such agents resided, and the Supreme Court of New York held such property was not taxable in New York, and the case of *People ex. rel. Jefferson vs. Smith, 88 N. Y. 576* already referred to.

The effect of these decisions is, construing the statutes of the state of of the owner's domicile, in the light of the *situs* of the property in a foreign state, that the property is not taxable in the state of the owner's domicile, Surely this does not conflict with the principle that the property may acquire such a *situs* as to be taxable in the foreign state. And the property may be taxed in both states.

Coe vs. Errol, 116 U. S. 517.

Third. There is another line of decisions like *Herron vs. Keeran, 59 Ind. 472*, which hold that property merely in the hands of an agent for transitory purposes, like a note for collection, is not taxable where the agent resides. Clearly such decisions do not conflict with the principle that when such property has become permanently located so as to acquire a legal *situs* in another state, it can be taxed there.

Fourth. There is another line of decisions like *Railroad Company vs. Jackson, 7 Wall. 262*, and case of *State Tax on Foreign-held Bonds. 15 Wall, 300*, where the right to tax a non-resident bond holder on account of the road being in part in the state seeking to tax was denied. No question of the property of the non-resident having by a course of business acquired a *situs* in the state other than that of the owners domicile was raised or involved. Nor are such decisions in conflict with

the entirely different proposition that the owner may give his property such a *situs*.

Nor is the doctrine laid down in *Erie Railroad vs. Penn. 153 U. S. 628*, cited by plaintiff in error, adverse to the rule we contend for in the case at bar. In fact, it has no application. There the Court held that Pennsylvania could not impose upon the railroad company the duty when paying, in the City of New York, interest, of deducting from the interest the amount assessed in Pennsylvania upon the bond, and that the act under consideration impaired the obligation of a contract.

Fifth. Again there is a line of decisions holding that the property may, and in the cases referred to, did acquire such a *situs* in the state where the agent resided, as to render it taxable, which we shall cite, and which will be considered more at length.

All of these propositions are in perfect harmony and involve no conflict of principle, nor has their adjudication led to any conflict of authority. In fact, in many of the decisions above referred to, notably in the case of *State Tax on Foreign Held Bonds, Herron vs. Keeran, 59 Ind. 472, Commonwealth vs. American Dredging Co., 122 Pa. St. 386, People ex. rel. Jefferson vs. Gardner, 51 Barbour 313*, and *People ex. rel. Jefferson vs. Smith, 88 N. Y. 576*, it is expressly stated that such property may acquire such a *situs* as to become taxable in a state other than that of the owner's domicile.

Upon the proposition that property of the character involved in this suit, may be given by its owner a *situs* in a state other than that of the owner's domicile, *Catlin vs. Hull, 21 Ver. 152*, is among the earliest, where it was held that debts owned by a resident of New York, under the control and management of an agent in Vermont, were taxable in the latter state, and that the legal fiction that the domicile of the owner is the *situs* of the property, has no force where the question is one of taxation, and the property is in fact in a state other than that of the owner's domicile.

Supervisors vs. Davenport, 40 Ill. 197, is in support of this doctrine. Also,

Redman vs. Commissioners, 87 N. C. 122.

People vs. Insurance Company 29, California 533.

Goldgart vs. The People, 106 Ill. 21.

Hutchinson vs. The Board, 66 Iowa, 35.

where the money loaned belonged to a citizen of England, but the Court held that it being under the exclusive control of an agent, the attempt to tax in Iowa should be sustained.

Other cases sustaining this doctrine may be cited.

St. Louis vs. Ferry Co., 11 Wall. 423.

Pullman Car Co. vs. Pennsylvania, 141 U. S. 18.

where this Court say:

"For the purpose of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner, and he may be taxed on its account in the place where it is, although not the place of his domicile, and even if he is not a citizen or resident of the state which imposes the tax." (p. 22.)

In this case there was a dissenting opinion, but the dissenting opinion did not go to the proposition here involved. On page 31, Justice Bradley, speaking for the dissenting justices, says:

"But when personal property is permanently located in a state for the purpose of ordinary uses or sale, then indeed it is subject to the law of the state, and to taxation, as well when owned by persons residing out of the state as when owned by persons residing in the state. It has then acquired a *situs* in the state where it is found."

And in the case of *Coe vs. Errol, 116 U. S. 517*, the fact that it is taxed in the state of the owner's domicile, does not defeat the right of the state in which the property has a *situs* to tax it also.

In *Wilcox vs. Ellis, 15 Kan. 588*, the plaintiff resided in Kansas and sold land in Illinois, taking notes which were deposited in the bank in Illinois, to be canceled and delivered as

paid. The attempt was made to tax these notes in Kansas, but the Court held they were not taxable in that State.

In *Fisher vs. Commissioners, 19 Kan. 14*, the case was similar except that the land was in Iowa, and it was again held that the notes were not taxable in Kansas.

State vs. St. Louis County, 47 Mo. 594.

A resident of Illinois at the time of his death, owned bonds issued by an association in St. Louis. In this case the bonds were listed and taxed at his domicile in Illinois. Ancillary administration being taken out in Missouri, the bonds were held taxable in Missouri in the hands of the administrator.

The Court, reviewing the authorities from *Catlin vs. Hull* down say:

"In no sense can the assets be said to be in the hands of a foreign administrator. It does not matter whether or not they may have been transmitted, or rather the evidence and representations in the shape of bonds and notes, from such administrator to the local administrator."

In *Curtiss vs. Ward, 58 Mo. 295*, the same rule was announced. In *Poppleton vs. Yamhill County, 18 Or., 274* a citizen of Oregon had sent money to be loaned in Washington. The notes were retained in Washington, and an attempt was made to tax them in Oregon. The Court decided they were not taxable in Oregon, and gave as its reasons, among other things,

"The money, notes and mortgages were undoubtedly subject to taxation in Washington Territory. The right to tax them there is sustained by a line of decisions by the courts on the subject, since the one made in *Catlin vs. Hull* down to the present time, and they are undoubtedly correct in principle."

Billinghurst vs. Spink County, 5 S. Dak. 84, where it is said:

"A non-resident who sends money into this state, and surrenders its possession and control to agents, fully authorized to loan, invest and manage the same, subjects such property to the jurisdiction of this state for the purpose of taxation, and the

legal fiction that the *situs* of such property is at the domicile of the owner, yields to the requirements of justice."

Finch vs. York County, 19 Neb. 50.

The plaintiff, a resident of New York, came to Nebraska bringing money which he loaned to citizens of that state, taking notes and mortgages to secure the same. When he returned, he left his notes and mortgages, and his interest connected with the money, in the hands of agents in Nebraska, giving them authority to collect and re-loan the same. The Court held the debts taxable in Nebraska.

The Court say:

"The power of the legislature to separate for the purpose of taxation, the *situs* of personal property, whether of a tangible nature, or in the form of a chose in action, from the domicile of the owner, is unquestioned, and if such property in any form is within its jurisdiction, it may tax it."

In *Bowman vs. Boyd, 21 Nev. 281*, the plaintiff was a resident of California, but had little property there, making most of his investment in the shape of mortgage investments in Nevada. He escaped taxation in California, on his personal property on the plea that it was situate in Nevada. The Court of Nevada held that he could not be allowed to entirely escape taxation on his personal property, and held that his only business was conducted in Nevada, the investments in making which his business consisted, were properly taxable in that state, citing *Board vs. Davenport, 40 Ill. 197.*

Dundee Mortgage Co. vs. School District, 19 Fed. 359.

cited with approval in *Savings Society vs. Multnomah Co., infra* is also in point.

It was claimed on the argument below that the case of *State Tax on Foreign Held Bonds, and Kirtland vs. Hotchkiss* were opposed to our contention. We have already referred to the case of *State Tax on Foreign Held Bonds, and Kirtland vs. Hotchkiss* still less applies to the case at bar. In the latter case, the question was not the taxability of the property in

Illinois, but the question of its taxability in Connecticut, and this court in the recent case of *Savings and Loan Society vs. Multnomah County, infra*, has declared that there was nothing in the Kirtland case which would be opposed to the taxability of the property in the state of Illinois. On the contrary, as we have already shown, this Court has declared that it is a settled rule in this Court that for the pupose of taxation, personal property may be separated from its owner. And the case of *Tappin vs. Merchants' National Bank, 19 Wall. 490*, was cited by both the Missouri and Nebraska courts, in the decisions we have referred to in support of their position.

The case of *Walker vs. Jack*, decided by the Circuit Court of Appeals, Sixth Circuit, 88 Fed. Rep. 576, sustains the proposition for which we contend.

The case of *Adams Express Company vs. Ohio, 165 U. S. 194*, lays down principles in line with our proposition, but the latest and most decisive case is *Savings Society vs. Multnomah County, 169 U. S. 421*, and is decisive of this question, if it was not already firmly established by the cases cited in that opinion. The fact that the statute of Oregon taxed the mortgage and debt under the designation of real estate, can make no difference. Under the laws of Oregon, a mortgage as stated by this court, conveys no legal title, and creates only a lien, a security for the debt, and we assert without fear of contradiction, that such is the law of Minnesota. Under the Oregon statute, the mortgage and debt are taxed as land. In Minnesota they are designated and taxed as credits. No one can question the right of the legislature to place any designation upon them that it pleases. In Oregon the mortgagee could deduct the mortgage debt from his assessment, under the Minnesota law both debtor and creditor, resident and non-resident, may deduct from his credits all *bona fide* indebtedness. The law of Minnesota has never recognized the system of deducting debts secured by mortgage on real estate, from the value of the real estate, either as to residents or non-residents, but has seen fit to provide a system of deducting from credits all *bona fide* indebtedness. This is purely a question of state policy.

And in any event, the mortgagee cannot complain of the policy. If a state sees fit to allow a mortgagor to deduct from the value of his real estate, the amount of the mortgage which he has placed upon it, he would be the gainer. If the state does not allow him to make such deduction, he might be said to be the loser, but in neither event does it make any difference to the mortgagee; neither has he any right to complain. It is enough to say that the mortgagee is in no position to complain of the policy, and, if it was material to this discussion, a complete answer to any suggestion that the policy is open to criticism is found in the bare statement that all persons owning similar property are taxed alike.

Tappin vs. Merchants' National Bank, 11 Wall. 490-504.

The only difference between the two states in this respect is that in Oregon, all mortgage debts are taxed without regard to the business course of the management of the property, while in Minnesota, as to non-residents, the property must be *invested, loaned or controlled* by an agent. This too isa mere question of state policy.

The Supreme Court of Minnesota, under the statutes involved in this case, and as to the same fund but for different years, held the property was taxable and this we understand would be decisive, especially as to the scope and affect of the statute when the same is under consideration by this Court.

State Railroad Tax Cases, 92 U. S. 575.

Chicago etc. Railway Co. vs. Minnesota, 134 U. S. 418.

Palmer vs. McMahon, 133 U.S. 660.

Adams Express Co. vs. Ohio, 165 U. S. 194.

During the lifetime of Cyrus Jefferson then, this property, as judicially determined by the Supreme Court of Minnesota, acquired such a *situs* as rendered it taxable in that state. Upon his death and succeeding to the property Mrs. Bristol, continuing the same course of business and management, the *situs* remained the same. The *situs* of this property thus having been fixed and established in Stillwater, the mere temporary removal of the notes to New York, under the circum-

stances surrounding such removal, the fact that tax litigation as to the same was then pending, that they were subject to be returned and were in fact returned upon call of the McCluers, to Stillwater from time to time, there payable, paid, renewed or foreclosed and in short, that all business relating to them, and all use thereof for any purpose whatever was transacted and had in Stillwater, could hardly be said to in any manner affect or change the *situs* thereof.

While the notes were sent east in 1885, yet the agent in Minnesota was clothed with more authority, and a more absolute management and control of the business after the death of Cyrus Jefferson, than before, by the execution of the power of attorney by Mrs. Bristol, which continued in force down to 1890, so that while from 1885 to 1890 the notes were sent east, yet, during all that time, the existence of the power of attorney would, it seems to us, actually add to the localization of the business in Minnesota.

It must be remembered that the business of negotiating loans, re-loaning and re-investing the money collected, continued after the notes were sent east in all respects as theretofore, and glancing at the amounts standing for the several years after 1885, it will be seen that there was no material decrease in the volume of the business. (Record page 48, folio 86). The agents continued to exercise the same control as theretofore, with additional authority, until 1890, of a power of attorney. We feel justified in urging that the sending of the notes east after the former litigation had commenced in Minnesota, was at the most, a mere subterfuge; the act was not accompanied by any change in the nature of the business. For ten years, the time covered by this proceeding, it continued practically the same, and the removal was, of necessity, merely temporary. They were still made payable, and all payments of interest and principal were paid at the office of the agents in Stillwater. They were as much subject to the control of the agents as ever, they were subject to be, and were in fact, returned to Minnesota whenever the agents required them in the prosecution and management of the loan business.

It was the fact that the property thus obtained a permanent character in Minnesota, was loaned and re-loaned, invested and re-invested by the agents in short that the indebtedness was created and remained there, that gave it a *situs* in that state.

The notes are but evidence of the debt. Nor are they sole evidence. If destroyed, the debt could still be established and enforced. It is *the right, the credit, the debt*, which is the property to be taxed.

In *Dundee Mortgage Co. vs. School District, 19 Fed. 359*, the notes were payable at Dundee. The notes and mortgages, after being executed, were transmitted to the home office at Dundee, where they were kept until the borrower desired to pay the same, when they were returned to Oregon for that purpose.

To the same effect is *Mumford vs. Sewell, 11 Or. 76.*

In *Board vs. Davenport, 40 Ill. 197*, the court held that the return of the papers to New York was a matter of no importance.

In *Finch vs. County of York, supra*, the court ignored, as un-important, the fact that the evidence of indebtedness was not in Nebraska.

In *Hutchinson vs. Board of Equilization, 66 Iowa, 35*, the agent made a note to his principals which being designed solely for the purpose of avoiding taxation, failed to accomplish that purpose.

In *Jones vs. Seward, 10 Neb. 154*, a banker purchased bonds with the money ordinarily used in his banking business, and the Court held that it was a mere devise, fraudulent and

"Where a change is thus made for the sole purpose of defrauding the government, the party making it cannot shelter himself behind such temporary change."

To the same effect is *Mitchell vs. Board of Commissioners 91 U. S. 206.*

That the *situs* of the debt is not to be determined alone by the place where the evidence of the debt happened to be:

Wyman vs. Halstead, 109 U. S. 654. See page 656.

Johnson vs. Oregon City, 2 Ore. 327.

holds that loans made by a non-resident are taxable inthe State of Oregon under the statute providing for the taxation of property actually within the state, even though the notes and mortgages are deposited outside.

In fact, it would be very difficult to improve either upon the logic or the language of the Circuit Court in the case at bar, where it is said:

"The fact that after March, 1885, the notes were sent to Mrs. Bristol in New York, made no difference. Whether she she regarded the notes as safer in her custody in New York State, or had them sent in the hope of avoiding taxation in Minnesota, is immaterial, the business remained under the full management and control of the agents at Stillwater beyond doubt. The very notes were made payable at the office of these agents at Stillwater, and were returned there for the payment, renewal, foreclosure of securities, etc."

WAS THE RIGHT TO FILE THE CLAIM BARRED BY THE STATUTE OF LIMITATIONS.

One question remains to be considered. Counsel for plaintiff in error in their brief raise the point that the remedy for the collection of the taxes for the years 1883 to 1888, inclusive, was barred by the Statute of Limitations of the State of Minnesota. We respectfully insist that this question cannot be raised at this time. It was not included in any of the assignments of error in the transcript or record. It is true it was suggested in the answer, but the record fails to disclose that it was insisted upon at the trial and the opinion of the District Judge does not mention it, no exception is taken to any ruling upon it, and no assignment was taken upon that ground, and it cannot be said to fall within that class of plain errors which the court will notice, and consequently it is too late now to raise it

However, we submit there is no force in the claim. During all the time in question, Sophia Bristol during her life

time, and James Bristol, were residents and citizens of New York State, and had no property in ~~said State~~ Minnesota other than that taxable sought to be taxed.

Findings, Page 43 and 45, of Record.

Section 5142 of the Statutes of Minnesota reads as follows:

"If when a cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state, and if after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not a part of the time limited for the commencement of this action."

It will be seen from the foregoing that the statute of limitations in Minnesota does not run against a right of action while the party against whom the right is claimed, is out of the state when the cause of action accrues.

We now come to Section 1567 which provides:

"All unpaid personal property taxes shall be deemed delinquent on the 1st day of March, next after they become due. * * * On the 1st day of April in each and every year, the County Treasurer shall make a list of all such delinquent personal property taxes which he shall certify to the Clerk of the District Court, and the said Clerk shall immediately issue his warrants to the Sheriff of the County, directing him to proceed to collect the same, and if such taxes are not paid upon demand, said Sheriff shall *distrain* sufficient goods and chattels belonging to the person charged with such taxes, if found within the County."

The language is, "shall distrain the goods and chattles." There is no provision for service of any process upon the delinquent tax payer at this point.

Now, it is elementary that nothing can be taken in distraint but tangible property, capable of seizure.

Mitchell vs. Coats, 47 Pa. St. 202.

Davis vs. Arledge, 3 Hill (S. C.) 170.

In the latter case Earle, J. after holding that books of

account of a merchant are within the spirit of an exemption law, says:

"But there is a more conclusive reason why they are not liable to seizure, * * * and indeed, they are not goods and chattels in the ordinary sense of the words, but merely evidence of debt, choses in action, which we think, have never been liable to distress for rent, any more than to be taken in execution."

It would require very plain statutory authority and ample provisions as to the detail of the procedure, to seize credits upon distraint.

Now, during all the time covered by these proceedings, there was no tangible property in Minnesota belonging to Sophia Bristol. Even the money which might be on hand in the possession of the McCluers, was in their name, mingled with their own, and certainly not to be thought of as the subject of distraint.

The Statute proceeds further. After providing for the return of the tax warrant and the review of the delinquent list by the commissioners, Section 1569 provides:

"Within ten days after the adjournment of the board of commissioners, the auditor shall file a copy of said revised list with the Clerk of the district court of the county, and within ten days after the filing of such copy, the clerk shall issue and deliver to the sheriff of the county where the person, against whom such tax is claimed, may at the time reside, or be for service, a citation to each delinquent named on the list, stating the amount of the tax and penalty, and requiring such delinquent to appear on the first day of the next general term of the district court in the county appointed to be held at a time not less than thirty days after the issuance of such citation, and show cause, if any there be, why he should not pay said tax and penalty, and if he fails to pay said tax, penalty and cost to the sheriff before the first day of the term or on said day to show cause as aforesaid, the court shall direct the clerk to enter judgment against such delinquent for the amount of such tax, penalty and cost."

It will be seen that this last section makes provision for the first step in the nature of a judicial proceeding to enforce the tax. The citation issues requiring the party to show cause pursuant to which he may interpose his objections and defence.

The issuing of the warrant under Section 1567 is not the commencement of any proceeding against the party, no provision for its service or for the party to make or meet any issue on it, but it is the citation issued under Section 1569 after return of warrant, which is really the commencement of the proceeding upon which, and only upon which, a judgment can be finally rendered.

Counsel are in error when they say,

"From the foregoing statutes it appears that if taxes were valid, Washington County had the right to proceed to distrain the property and enforce the lien thereon, on the first day of April following the year when the tax was assessed and levied in each year," for the reason there was no lien at that time, and there was no property of the character subject to distraint. They are correct, however, when, following the language above quoted, they say, that,

"It had the right to cite the person taxed into court, and apply for personal judgment in the month of July in each year, after the tax was levied and assessed."

That was the first point in the proceedings when they could take steps looking to a judgment, but where were the parties then? In New York, and being there, no process could be served and the statute did not run.

What the Supreme Court of Minnesota held in the *Redwood County Case, 40 Minn., 512*, is,

"A tax being a liability created by statute, and the filing of the delinquent list being as the statute declares, and as we have held, the institution of the action against the land for the recovery of the tax appearing against it on the list, and inasmuch as the nature of the right sought to be enforced and not method of proceedure is the test, we are unable to see why it should make any difference whether the action is *in rem*, or *in*

in personam, against the property, instead of against its owner."

We have therefore come to the conclusion that these proceedings are within the meaning of the statate, "An action upon a liability created by statute" and are barred as to all taxes for the enforcement of which such proceedings might have been instituted more than six years before the commencement of the present proceeding had such taxes been assessed within the proper years.

In the case at bar, the taxes were regularly assessed each year and all that could be claimed under the statute quoted, and the facts of the present case is, that the right of action would be barred six years from the time when the action or proceeding could be commenced by the issuance of a citation for the purpose of obtaining a judgment, provided the party was within the state. The case differs from the Redwood County case in this: There the proceeding was to be instituted directly against the property taxed, and could never affect the person directly or any other property; while here the object of the proceedings under the citation is to fix the obligation of the party against whom the citation issues and subject other property of such person within the state, to the payment of the tax.

Conceding all that is decided in the Redwood case, the fact remains that during all the time subsequent to the date when the proceedings could have been instituted for any of the years in question, Sophia Bristol during her life time, and James Bristol, until he appeared in Minnesota, in probate proceedings, were without the State of Minnesota. While the assessment of the tax might be said to be a proceeding *in rem* it becomes a proceeding *in personam* when it reaches the stage where process issues to bring the party into court, and determine an issue and obtain a judgment. When the proceeding reached the point where distraint could be made, there was no tangible property the subject of distraint. When it reached the point when the right to proceed *in personam*, accrued, the person was without the state. Nor does the fact that after the right to proceed *in personam*

accrued no action could be brought on account of the absence of the party, defeat the right to bring the action when service cau be made. If there was no provision for further proceeding, still there would be a valid tax constituting a statutory liability, which in the absence of any law providing any other method, might be enforced by an ordinary personal action.

County of Redwood vs. Land Co., 40 Minn. 512.

And it follows that such action could be brought whenever the party came within the jurisdiction of the state, and the statute of limitation does not apply where the party is without the state. And the fact that they had to come within the jurisdiction of Minnesota in probate proceedings, may be fairly urged as an additional reason why the *situs* of the property may be said to be in Minnesota.

It is respectfully submitted that the judgment appealed from should be affirmed.

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